(2)

No. 01-699

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BENITA SHVAUGHN HARRIS,

Petitioner,

v.

COCA-COLA BOTTLING CO. CONSOLIDATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Coca-Cola Bottling Co. Consolidated is a publicly traded corporation. The Coca-Cola Company, a publicly traded corporation, owns 10% or more of the stock of Coca-Cola Bottling Co. Consolidated.

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COUNTERSTATEMENT OF CASE

Petitioner, a former employee of Coca-Cola Bottling Co. Consolidated (hereinafter "Consolidated"), filed a Complaint against Consolidated alleging various claims for race discrimination under federal law and North Carolina common law. The Complaint also alleged claims for retaliatory discharge and retaliatory hostile environment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. The Complaint alleged that Consolidated retaliated against Petitioner because she complained about an advertisement run by Consolidated in *The Charlotte Observer* and because she sent an e-mail to high ranking Consolidated officials complaining about the promotion of a co-worker.

On April 14, 1999, the district court granted Consolidated's motion for summary judgment on all of the claims in the Complaint and dismissed the action (Pet. Petition App. pp. 7a-32a). The district court dismissed the retaliatory discharge and retaliatory hostile environment claims on the grounds that Petitioner had not engaged in activity protected under Section 704(a) of Title VII (Pet. Petition App. pp. 27a-32a). Petitioner filed an appeal to the United States Court of Appeals for the Fourth Circuit. Petitioner appealed only the dismissal of the retaliatory discharge and retaliatory hostile environment claims.

On August 16, 2001 the Court of Appeals issued an unpublished per curiam opinion affirming the district court's order "substantially on the reasoning of the district court" (Pet. Petition App. pp. 2a-6a).

Petitioner did not request a rehearing by the Court of Appeals.

REASONS FOR DENYING THE WRIT

The sole question presented by the petition is whether the Court of Appeals' decision, adopting the district court's reasoning, "directly and plainly conflicts" with this Court's prior decision in *Reeves v. Sanderson Plumbing Co.*, 530 U.S. 133 (2000). The writ should be denied because: (a) to the extent Petitioner argues that the district court's decision conflicts with the "pretext" holding of *Reeves*, Petitioner failed to make this argument in the Court of Appeals and waived the argument; (b) the district court did not reach the issue of pretext in deciding the retaliation claims and the *Reeves* decision is not implicated by the decision; (c) the actual issues Petitioner presents in her petition do not warrant this Court's review; and (d) the district court did not err in concluding that Petitioner did not engage in activities protected by Title VII.

I. THE PETITIONER WAIVED ANY ARGUMENT REGARDING PRETEXT.[1]

The central holding of *Reeves v. Sanderson Plumbing Co., supra,* is that a plaintiff's proof of a prima facie case of discrimination, combined with sufficient evidence that the employer's asserted non-discriminatory reasons for its actions are false (or, a pretext), may permit a finding of unlawful discrimination. 530 U.S. at 144. In her brief filed with the Court of Appeals, Petitioner acknowledged that the district court did not consider the issue of pretext and she waived any argument regarding pretext by failing to address it in the Court of Appeals. In her brief, Petitioner stated:

> After the establishment of *prima facie* case, Appellee can rebut the inference of discrimination

1. The Court of Appeals' decision erroneously states that oral argument was held in this case. It was not.

> by producing evidence of legitimate reasons for the Appellant's termination. *Karpel v. Inova Health Systems*, 134 F.3d 1222, 1227-28 (4th Cir. 1998). If successful, the Appellant must prove that Appellee's offered reasons were mere pretext, and that the Company was instead unlawfully motivated by Appellant's protected activity. *Id.* Because the District Court incorrectly ruled no *prima facie* case existed, we do not reach the rebuttal and pretext issues in this appeal.

(Brief of Appellant, p.18 n.1.)

Since Petitioner waived her argument regarding pretext, and the Court of Appeals did not consider the issue, that issue is not properly before this Court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but not in the court of appeals is not properly before us).

II. BECAUSE THE *REEVES* PRETEXT STANDARD IS ONLY IMPLICATED ONCE A PLAINTIFF ESTABLISHES A PRIMA FACIE CASE, WHICH PETITIONER DID NOT DO HERE, THE FOURTH CIRCUIT'S DECISION AFFIRMING THE TRIAL COURT'S DECISION DID NOT INVOLVE A *REEVES* ANALYSIS AND THEREFORE DID NOT CONFLICT WITH THIS COURT'S PRECEDENT.

In deciding the retaliation claims, the district court never reached the stage of addressing whether defendant's reason for termination was a pretext for unlawful discrimination and never used either a pretext or pretext-plus standard. Rather, it concluded that Petitioner could not establish a prima facie

case of retaliation under Title VII. Further, although the district court's opinion cannot be construed to involve a *Reeves* analysis, the Fourth Circuit's short decision affirming it does not suggest that it used a standard contrary to Reeves, merely that it reached the same conclusion.

Petitioner's reliance on *Reeves* is a transparent attempt to force this case into a category of decisions typically considered for review by this Court where in fact there is nothing compelling such review. The trial court granted summary judgment on Petitioner's retaliatory discharge claim on the sole basis that Petitioner failed to establish a prima facie case of retaliation under Title VII. Specifically, the court concluded that Petitioner had not engaged in protected activity, an essential element of a Title VII retaliation prima facie case.

It is only after a plaintiff establishes a prima facie case that the burden shifts to a defendant employer to produce a legitimate non-discriminatory reason for the adverse employment action. It is at this point in the proof scheme, after a plaintiff establishes a prima facie case and the employer produces a legitimate reason for the adverse job action, that the *Reeves* decision becomes relevant. *Reeves* resolved a split among the circuits over whether a plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable fact finder to reject the employer's non-discriminatory reason for its decision, is sufficient to sustain a liability finding. The Court concluded that "plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. at 148.

Petitioner's reliance on the *Reeves* decision is misplaced because the district court held that Petitioner did not establish a prima facie case. The trial court found:

> [N]o reasonable factfinder could conclude by reading Plaintiff's e-mail that she was protesting the Company's treatment of blacks, or its commitment to hiring minorities. As Plaintiff cannot establish that she engaged in opposition activity protected by Title VII, she fails to make a prima facie showing of retaliation and Defendant is entitled to judgment as a matter of law.

(Pet. Petition App. p. 31a).

Consequently, without a finding that Petitioner met her burden to show a prima facie case, the burden never shifted to defendant to produce a legitimate non-discriminatory reason for the discharge. Without that burden shift, the burden in turn never shifted back to Petitioner to raise an issue of fact as to whether the cited reason for her termination was pretext for unlawful discrimination. *Reeves* simply never entered the trial court's analysis of the retaliation claims.

Indeed, it is curious that Petitioner now asserts that the decision conflicts with *Reeves* when she acknowledged in her brief to the Fourth Circuit that the district court never reached the issue of pretext. As discussed *supra*, Petitioner stated in her brief to the Fourth Circuit that "[b]ecause the District Court incorrectly ruled no *prima facie* case existed, we do not reach the rebuttal and pretext issues in this appeal." (Brief of Appellant, p. 18 n.1). Petitioner's assertion that the trial court's decision conflicts with *Reeves* thus does not withstand scrutiny, and the writ should be denied.

III. THE PETITION DOES NOT RAISE A SUBSTANTIAL QUESTION WORTHY OF THIS COURT'S REVIEW.

The Petition in this matter amounts to nothing more than a request for this Court to conduct another de novo review of the

district court's judgment. The Petition does not present the type of question that warrants review by the United States Supreme Court.

This Court rightfully exercises its discretion to review the matters brought before it only for compelling reasons. Rule 10 of the Rules of the Supreme Court of the United States provides guidance regarding the types of questions that might warrant the granting of a writ of certiorari. Here, Petitioner attempts to invoke the grounds provided for in Rule 10(c) by claiming that the Court of Appeals' decision conflicts with existing Supreme Court precedent. (Pet. Petition p. 9 n.3). As argued above, the Court of Appeals' decision neither conflicts with *Reeves* nor implicates its holding in any way. Rather, Petitioner seeks simply another review of the district court's decision granting summary judgment. By way of example, Petitioner make the following assertions summarizing the types of issues on which she seeks review:

> The lower court erred in not finding that Petitioner established a *prima facie* case of retaliatory discharge and harassment, by refusing to draw all reasonable inferences in favor of Petitioner and consider the totality of the events giving rise to her reasonable belief that she was being subjected to a racially hostile work environment.
>
> . . . .
>
> Given that the trial court erred both in finding that Petitioner did not engage in protected activity and in crediting the Company's nondiscriminatory reason, it becomes apparent that summary judgment was improperly granted.

(Pet. Petition pp. 15, 17).

These statements show the true nature of the questions Petitioner raises.

Other arguments raised by the Petitioner are of a similar nature. Petitioner asserts that the district court "applied an incorrect formulation of . . . the summary judgment standard in general" (Pet. Petition p. 12). This is not correct. The district court properly stated the summary judgment standard in its decision (Pet. Petition App. p. 20a). Petitioner's real argument is that the district court engaged in fact finding and failed to view the facts in the light most favorable to her (Pet. Petition p. 13). This was the thrust of her argument to the Court of Appeals. Her attempt to rehash that argument should not prompt this Court's review.

Petitioner also argues that the district court erred "by accepting the Defendant's asserted non-discriminatory reasons as true when there was evidence to the contrary." (Pet. Petition, p. 13). This argument is patently false and misleading. The district court dismissed the retaliation claims solely on the grounds that Petitioner did not engage in activity protected by Title VII and failed to establish a prima facie case (Pet. Petition App. pp. 29a-31a). The court did not reach nor consider the issue of Consolidated's non-retaliatory reasons for its actions (Pet. Petition App. pp. 29a-31a).

Rule 10 counsels that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." These are precisely the types of errors upon which Petitioner seeks review. The Petition does not raise a substantial question that warrants this Court's review and the writ should be denied.

IV. THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER DID NOT ENGAGE IN PROTECTED ACTIVITY.

The Court of Appeals, adopting the district court's reasoning, concluded that Petitioner did not engage in protected activity and, accordingly, could not establish a prima facie case of retaliation. The court held that Petitioner's concern regarding wording of the newspaper advertisement was not opposition to a practice made unlawful by Title VII. The district court also held that Petitioner's electronic correspondence to Company officials was not opposition to a practice made unlawful by Title VII. Although not framed as the "Question Presented" to this Court, Petitioner asserts that these holdings are erroneous.

Section 704(a) of Title VII provides as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . , because he has opposed any practice made an unlawful employment practice by this subchapter, or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

"Participation" activities differ from "opposition" activities and opposition activities are afforded a lesser degree of protection. *Laughlin v. Metropolitan Washington Airport Auth.*, 149 F.3d 253, 259 n.4 (4th Cir. 1998).

In order to be protected as opposition activity, an employee's conduct must "oppose[] [a] practice made an

unlawful employment practice by this Title VII," 42 U.S.C. § 2000e-3(a); *see Jamil v. Secretary, Dep't of Defense*, 910 F.2d 1203, 1207 (4th Cir. 1990) (to be protected, opposition must be " 'to conduct or practices violative of Title VII' ") (quoting *Theard v. United States Army*, 653 F. Supp. 536, 545 (M.D.N.C. 1987)).

Petitioner's electronic correspondence expressing her outrage at Steve Hewitt's promotion was not opposition to a practice made unlawful by Title VII. Petitioner's complaint was not that Consolidated's decision to promote Hewitt was discriminatory or unlawful. For example, she did not oppose Hewitt's promotion because Consolidated selected Hewitt for the position over an equally or better qualified minority candidate. Rather, Petitioner believed that the promotion was a poor business decision and that it was unfair to promote Hewitt in light of his past behavior towards her (Pet. Petition App. p. 30a). It simply is not unlawful under Title VII to make a poor or ill-advised promotion decision. Objectively, Consolidated's promotion of Hewitt was not unlawful and could not reasonably have been viewed as unlawful.

The Court of Appeals also properly held that Petitioner's expressed concerns about the newspaper advertisement were not protected opposition activity because the advertisement was not unlawful or discriminatory, and Petitioner could not objectively have believed it was unlawful. Petitioner did not complain that the advertisement was unlawful or discriminatory. She merely expressed concern that some African-Americans could find the parenthetical definitions in the advertisement demeaning.

Petitioner also contends that the district court "failed to note, let alone consider," evidence of other protected activity in which Petitioner allegedly engaged (Pet. Petition

pp. 13-14). Again, this is incorrect. The district court noted in its decision Petitioner's other so-called opposition activity (Pet. Petition App. 15a-17a).

The Court of Appeals correctly decided that Petitioner failed to engage in activity protected by Title VII, and that decision does not warrant review by this Court.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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